

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**CHARLES R. GATES AND
MABLE L. GATES,**

CASE NO. 09-52332-NPO

DEBTORS.

CHAPTER 7

**MEMORANDUM OPINION AND ORDER WAIVING APPEARANCE
OF DEBTOR MABLE L. GATES AT CREDITORS' MEETING**

On November 16, 2009, there came on for hearing (the “Hearing”) the Motion to Waive Appearance of Debtor at Creditor’s Meeting (the “Motion”) (Dkt. No. 15) filed by the Debtor, Mable L. Gates (“Mrs. Gates”), and the United States Trustee’s Amended Objection to Debtor’s Motion to Waive Appearance of Debtor at Creditor’s Meeting (the “Amended Objection”) (Dkt. No. 21) filed by R. Michael Bolen, United States trustee for Region 5 (the “UST”). At the Hearing, David L. Lord represented both Mrs. Gates and her husband and Co-Debtor, Charles R. Gates (“Mr. Gates”) (collectively, the “Debtors”), and Christopher J. Steiskal represented the UST. The Court, after having considered the pleadings, arguments of counsel, and relevant legal authorities, finds that the Amended Objection is not well-taken and should be overruled. Accordingly, the Motion should be granted for the reasons that follow.

Jurisdiction

This Court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Motion was proper under the circumstances.

Facts

1. On October 19, 2009, the Debtors filed a joint chapter 7 petition for relief under 11 U.S.C. § 302¹ of the United States Bankruptcy Code. (Dkt. No. 1).

2. Consistent with Rule 2003 of the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 11, the Clerk of this Court issued a notice requiring the Debtors to attend the first meeting of creditors (“Creditors’ Meeting”) under section 341 on November 17, 2009. (Dkt. No. 10).

3. On November 6, 2009, counsel for Mrs. Gates filed the Motion requesting that this Court waive the necessity of her appearance at the Creditors’ Meeting. As grounds for the waiver, the Motion cites Mrs. Gates’s “severe dementia.”

4. On November 9, 2009, the UST filed the United States Trustee’s Objection to Debtor’s Motion to Waive Appearance of Debtor at Creditor’s Meeting (the “Objection”) (Dkt. No. 18). The UST maintained that the explanation provided by Mrs. Gates for waiving her appearance at the Creditors’ Meeting under section 341(a) was “insufficient” and questioned whether Mrs. Gates had the “requisite mental capacity to file” this chapter 7 case.² The UST also questioned whether the Creditors’ Meeting could be rescheduled or conducted by telephone, by written interrogatories, or by some other method.

5. On November 13, 2009, the UST filed his Amended Objection. In addition to the reasons outlined in the original Objection, the UST claimed that neither the Bankruptcy Code nor

¹ Hereinafter, all code sections refer to the United States Bankruptcy Code, located at Title 11 of the United States Code, unless specifically noted otherwise.

² Notably, the UST has not filed any motion raising this issue.

the Federal Rules of Bankruptcy Procedure authorizes this Court to waive Mrs. Gates's appearance at the Creditors' Meeting and that only he has the discretion to accommodate Mrs. Gates's alleged mental disability by allowing her to appear by an alternative method, such as by telephone or by video link. According to the UST, his alleged discretion is exclusive and is reviewable only under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA").³

6. At the Hearing, counsel for Mrs. Gates indicated that Mr. Gates was willing and able to appear and testify in his wife's stead at the Creditor's Meeting.

Discussion

Section 343 requires every debtor to appear and submit to a bankruptcy examination under oath at the creditors' meeting. The purpose of the examination is "to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge." 11 U.S.C. § 343 Committee Notes. In addition, section 341 requires that, at the meeting, the trustee inform the debtor in a chapter 7 case of the consequences of bankruptcy, the availability of relief under other chapters of the Bankruptcy Code, and the effect of receiving a discharge of debts and of reaffirming a debt. 11 U.S.C. § 341(d).

A. Local Rule 11

The objections raised by the UST in his Amended Objection are squarely addressed by Rule 11 of the Uniform Local Bankruptcy Rules for the Northern and Southern Districts of Mississippi ("Local Rule 11"), which for over 20 years has provided a waiver in limited circumstances, as follows:

³ The UST contends that he falls within the definition of an "agency" under 5 U.S.C. § 551(1) of the APA and that his decision whether to accommodate Mrs. Gates's alleged mental disability constitutes an "agency action," as defined under 5 U.S.C. § 551(13), that is subject only to the judicial review provisions of 5 U.S.C. § 704.

Rule 11. Meeting of Creditors or Equity Security Holders

The appearance of the debtor and the debtor's attorney at the § 341(a) meeting is mandatory, *unless waived for cause by the bankruptcy court*. Failure of the debtor and the debtor's attorney to attend said meeting may result in the dismissal of the bankruptcy case or sanctions, including assessment of the expenses and attorney's fees of creditors attending the meeting as noticed.

Any request by the debtor made prior to the scheduled § 341(a) meeting to reschedule the § 341(a) meeting shall be submitted to the U.S. trustee. The debtor and the debtor's attorney shall be responsible for notifying all creditors of any rescheduling or waiver of a § 341(a) meeting, and failure to so notify creditors may result in the imposition of appropriate sanctions, including assessment of the expenses and attorney's fees of creditors attending said meeting.

Unif. Local Bankr. R. 11 (emphasis added). Until recently, Local Rule 11 has remained unchallenged during its 20-year history by the UST or by any other party in any reported decision. Moreover, the UST has not brought to the Court's attention any challenge made in an unreported decision.

By way of background, the Uniform Local Bankruptcy Rules for the Northern and Southern Districts of Mississippi (the "Local Rules") were adopted on May 4, 1989. Such Local Rules were authorized by an order entered by the District Judges of the Northern District dated July 26, 1988, and by an order entered by the District Judges of the Southern District dated August 5, 1988. The Mississippi District Court Judges, pursuant to Federal Rule of Bankruptcy Procedure 9029,⁴ authorized the Mississippi Bankruptcy Judges "to make local rules regarding bankruptcy practices and procedures, not inconsistent with the Federal Rules of Bankruptcy Procedure." The Local Rules

⁴ Currently, Fed. R. Bankr. P. 9029(a) provides, in pertinent part:

A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R. Civ. P., to make and amend rules of practice and procedure which are consistent with—but not duplicative of—Acts of Congress and these rules Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

became effective on July 1, 1989, after approval by the United States Court of Appeals for the Fifth Circuit. Since then, the Local Rules have been amended from time to time, but Local Rule 11 has remained substantially unchanged since its adoption on May 4, 1989, notwithstanding its recent re-formulation which is discussed in detail below.

B. Proposed Local Rule 2003-1

In early 2006, the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi began the process for revising the Local Rules to implement changes made to the Bankruptcy Code, particularly those made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), and to conform to the uniform numbering system⁵ prescribed by the Judicial Conference of the United States. Pursuant to 28 U.S.C. § 2077(b), the Mississippi Bankruptcy Judges appointed an advisory committee (the “Local Rules Committee”)⁶ to formulate and draft new rules of practice and procedure and from that group appointed a four-person steering committee (the “Steering Committee”)⁷ to oversee and coordinate the process. The Local Rules Committee was divided into subgroups, each covering a general subject area of the Federal Rules of Bankruptcy Procedure. The work of the Local Rules Committee extended over a two-year period. Ultimately, the Mississippi Bankruptcy Judges approved the

⁵ The uniform numbering system mandated by the Judicial Conference corresponds with the relevant number of the Federal Rules of Bankruptcy Procedure and consists of a four-digit national rule number, a dash, and a fifth digit, starting with 1.

⁶ The Local Rules Committee included about 30 members of the Mississippi bar from across the State of Mississippi, including lawyers in private practice (consumer and business lawyers, debtor and creditor lawyers, and lawyers from large law firms and from solo practices) and lawyers from state and local government agencies. An employee of the Office of the United States trustee served on the Local Rules Committee.

⁷ Members of the Steering Committee included Stephen W. Rosenblatt as chairperson, Robert A. Byrd, Kristina M. Johnson, and Nina Stubblefield Tollison.

Proposed Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi (“Proposed Local Rules”) for publication to the bar and to the public generally for an opportunity to comment on any of the proposed rule changes.

Of significance to the issue presented here, Proposed Local Rule 2003-1 provides, in pertinent part, as follows:

Rule 2003-1. Meeting of Creditors or Equity Security Holders

(a) Date and place

....

(3) Waiver of appearance

Upon written motion, the court, after notice and hearing, for cause shown, may waive the appearance of the debtor at the section 341(a) meeting of creditors. Waivers may be granted where a debtor is physically unable to appear at the original or rescheduled section 341(a) meeting of creditors or is unable to appear because of a mental incapacity. A motion to waive appearance shall be filed at least seven (7) days prior to the initial meeting of creditors or any rescheduled meeting of creditors and served on the interim trustee or the case trustee, as appropriate, the United States Trustee and all creditors.

Prop. Unif. Local Bankr. R. 2003-1. The rewording of Local Rule 11 into Proposed Local Rule 2003-1 brought about no major changes, and thus, Proposed Local Rule 2003-1 is essentially a carryover from current Local Rule 11⁸ under which the bankruptcy courts, the lawyers, the case trustees, and the United States trustee have operated for nearly 20 years.

The Mississippi Bankruptcy Judges submitted the Proposed Local Rules, with certain

⁸ Unlike Proposed Local Rule 2003-1, Local Rule 11 provides no examples of cause and does not specify the procedures that a debtor must follow in order to obtain a waiver. Both current Local Rule 11 and Proposed Local Rule 2003-1, however, recognize the discretion of the bankruptcy court to excuse an individual debtor’s appearance at the creditors’ meeting.

revisions made as a result of comments received during the notice period, but with no revisions made to Proposed Local Rule 2003-1, to the Fifth Circuit for approval on September 25, 2008, and submitted a slightly different version on December 12, 2008, to correct a typographical error. On November 16, 2009, the Circuit Executive's Office for the Fifth Circuit notified the Mississippi Bankruptcy Judges that the Rules Committee, acting for the Judicial Council of the Fifth Circuit, had approved the Proposed Local Rules. On December 18, 2009, the Mississippi Bankruptcy Judges entered an order adopting the Proposed Local Rules as the Uniform Local Bankruptcy Rules, effective February 1, 2010. Thus, Proposed Local Rule 2003-1 stands, consistent with current Local Rule 11, on the issue before this Court.

C. UST's Objections to Proposed Local Rule 2003-1

The UST raised his challenge to Local Rule 11 during the aforementioned rules formulation process. In May 2007, when the subgroups were drafting the new local rules, the UST wrote: "As U.S. Trustee, I hope that this will provide an opportunity to address some local customs that are of a concern to us. For instance, current Local Rule 11 appears to provide a procedure for the court to waive the appearance of a debtor at a meeting of creditors. Our position is that attendance by the debtor is mandatory and cannot be waived. Our procedure is to conduct meetings telephonically or by video when it is appropriate to do so." The UST's position that Local Rule 11 and its progeny, Proposed Local Rule 2003-1, are inconsistent with the Bankruptcy Code, was fully considered and rejected by the Steering Committee, the Local Rules Committee, the Mississippi Bankruptcy Judges, and the Fifth Circuit during the rules formulation process. Nevertheless, the UST's opposition to Local Rule 11 continues unabated, as evidenced by his Amended Objection to the Motion under consideration.

Specifically, the position advocated by the UST was considered by the appropriate subgroup, but not recommended to the Steering Committee. It also was considered by the Steering Committee, and again rejected. Finally, it was considered by the Mississippi Bankruptcy Judges before the Proposed Local Rules were published for comment, and once again rejected. No one found a valid reason to alter the substance of existing Local Rule 11, given that its provisions have worked so well for nearly 20 years.

On June 3, 2008, the UST again wrote to urge the deletion of the phrase that permitted the bankruptcy court to waive the requirement for a debtor to appear personally at the creditors' meeting. Again, both the Steering Committee and the Mississippi Bankruptcy Judges concluded that Proposed Local Rule 2003-1 should remain as recommended.

On February 20, 2009, the UST wrote the Circuit Executive's Office of the Fifth Circuit raising concerns that two of the Proposed Local Rules "improperly infringe upon the statutory duties assigned to the United States trustee," including Proposed Local Rule 2003-1. On March 5, 2009, Stephen W. Rosenblatt, Chairperson of the Steering Committee, acting on behalf of the Mississippi Bankruptcy Judges, responded to the UST's letter. In his response, he agreed to certain minor changes to address some of the concerns of the UST, but once again rejected the position of the UST that Proposed Local Rule 2003-1 divests the UST of authority granted by section 341 by allowing the court to waive a debtor's attendance at the creditor's meeting.

A staff attorney for the Fifth Circuit provided written comments to the proposed revisions, including Proposed Local Rule 2003-1, and concluded that whether to allow or preclude the waiver of a creditors' meeting was a legal determination for the Judicial Council of the Fifth Circuit. He also concluded that if the Judicial Council approved the possibility of a waiver, then allowing a debtor

to resort to the bankruptcy court for such relief (rather than solely to the trustee) would be consistent with the jurisprudence. As noted previously, the Rules Committee, acting for the Judicial Council of the Fifth Circuit, ultimately approved the Proposed Local Rules which will become effective on February 1, 2010 by order of the Mississippi Bankruptcy Judges.

D. Case Authority and Federal Rules of Bankruptcy Procedure Supporting Waiver of Debtor's Appearance

As noted by the staff attorney for the Fifth Circuit, jurisprudence supports the provision in Local Rule 11 and Proposed Local Rule 2003-1 recognizing the authority of the bankruptcy court to waive the debtor's appearance at the creditors' meeting scheduled under section 341. Courts have held that a debtor's attendance may be waived notwithstanding the mandatory language contained in section 343 "where a good and sufficient reason is given." See In re O'Donnell, 43 B.R. 679, 680 (Bankr. E.D. Pa. 1984) (good reasons for excusing a debtor's attendance include physical illness, military or religious service outside of the country, and emotional disorder); see also In re Rust, 1 B.R. 656 (Bankr. M.D. Tenn. 1979) (debtors must attend creditors' meeting unless they are physically unable to do so because of illness or involuntary confinement). Although none of these cases requires a bankruptcy court to waive the debtor's appearance, they recognize that the bankruptcy court has the discretion to waive the debtor's appearance, such as where there is evidence that the debtor is truly indisposed and is unlikely to provide information that is unavailable through other means, including through a representative or co-debtor. But see In re Agan, 285 B.R. 324 (Bankr. W.D. Okla. 2002) (refusing to allow exception to mandatory language of section 343 and holding that persons who are unable to attend section 341 creditors' meeting are simply ineligible for bankruptcy relief).

For example, the United States trustee in In re Oliver, 279 B.R. 69 (Bankr. W.D.N.Y. 2002),

moved to dismiss a chapter 7 case when the debtor unexpectedly died just three days before the scheduled creditors' meeting. Oliver, 279 B.R. at 69-70. The United States trustee filed a motion to dismiss, despite the appearance at the creditors' meeting of the debtor's brother to whom letters of administration had been issued. The United States trustee argued that the provision in section 343 that "[t]he debtor shall appear and submit to examination under oath at the meeting of creditors" under section 341(a) did not allow a case trustee any discretion to waive the debtor's appearance. Oliver, 279 B.R. at 70. Thus, the United States trustee contended that the debtor's case could not proceed in the debtor's absence. The bankruptcy court disagreed, noting that section 343 does not specify any penalty for a debtor's failure to appear. Instead, grounds for dismissal of a chapter 7 case are set forth in § 707(a), which specifies, in pertinent part:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—(1) unreasonable delay by the debtor that is prejudicial to creditors;

11 U.S.C. § 707(a); Oliver, 279 B.R. at 70. By its use of the word "may," § 707(a) imposed no mandate for dismissal of a chapter 7 case, but granted the bankruptcy court discretion to do so where cause existed. Oliver, 279 B.R. at 70. Observing that "death is the ultimate excuse," the bankruptcy court found no evidence of "unreasonable" delay. Oliver, 279 B.R. at 70. In the end, the court rejected the United States trustee's untenable position that a debtor's inability to appear at the creditors' meeting because of his death justifies dismissal of his case. Oliver, 279 B.R. at 70-71.

The decision in In re Bergeron, 235 B.R. 641 (Bankr. N.D. Ca. 1999), is also factually analogous to the case at bar. In that case, the 89-year old debtor suffered from multiple medical problems, including blindness, senile dementia, renal failure, and prostatism requiring a urinary catheter. Bergeron, 235 B.R. at 643. The debtor's wife testified at the creditors' meeting that her

husband was too ill to attend and provided the United States trustee with a medical opinion describing the debtor's poor health and stating that even if certain accommodations could be met to permit his attendance, the debtor could not testify competently. Bergeron, 235 B.R. at 643. The bankruptcy court rejected the United States trustee's contention that section 343 stripped the court of all discretion to excuse a debtor's appearance at the creditors' meeting. Bergeron, 235 B.R. at 643.

The court explained:

It would be ironic, indeed, for Congress to permit [the debtor] to seek chapter 7 relief and require that he be issued a discharge, but then to negate his ability to obtain that relief because he is physically and mentally unable to appear and be questioned under oath at the § 341 meeting. It would be a particularly bitter irony in this case, since no one has expressed the slightest interest in interrogating him. I cannot imagine that Congress intended such an "absurd and impracticable" result.

Id. at 644.

The district court in Marti v. Macco (In re Jones), 1999 WL 1288951, No. 98CV6205 (E.D.N.Y. Nov. 8, 1999), likewise rejected the United States trustee's argument that section 343 mandated the debtor's attendance at the creditors' meeting. Holding that the debtor's incarceration excused his attendance at the creditors' meeting, the court found:

While 11 U.S.C. § 343 states that the debtor "*shall* appear" at the § 341 creditors' meeting, courts may waive personal appearance when for good cause the debtor cannot appear. Jones was incarcerated at the time of the meeting. Jones' father, armed with a power of attorney, attended the meeting as Jones' agent.

Id. at 5-6 (citations omitted).

Two Federal Rules of Bankruptcy Procedure address the mental incompetency of debtors: (1) Rule 1004.1,⁹ which applies when a debtor is incompetent *before* his bankruptcy case is filed;

⁹ Rule 1004.1 addresses the filing of a voluntary petition on behalf of a debtor who is an infant or incompetent person. Fed. R. Bankr. P. 1004.1.

and (2) Rule 1016,¹⁰ which applies when a debtor becomes incompetent *after* his bankruptcy case is filed. These two rules exist in order to make relief under the Bankruptcy Code available to incompetent debtors. There is no reasonable basis on which to allow a mentally incompetent debtor to file for bankruptcy or to continue in a bankruptcy case after he becomes mentally incompetent only to dismiss a case upon the debtor's failure to appear at the creditors' meeting because of mental disability.

In summary, the authority of the bankruptcy court to waive the attendance of the debtor at the creditors' meeting—notwithstanding the position of the UST that the creditors' meeting cannot be waived and that he, and he alone, has the authority to reschedule or permit appearance by an alternative method subject only to review under the APA—is well supported not only by case law and the Federal Rules of Bankruptcy Procedure but also by: (1) the Mississippi Bankruptcy Judges that adopted Local Rule 11; (2) the Fifth Circuit that approved Local Rule 11, (3) over 20 years of implementation of Local Rule 11; (4) the Mississippi Bankruptcy Judges that adopted Proposed Local Rule 2003-1 with a waiver provision similar to that in Local Rule 11; and (5) the Fifth Circuit that approved Proposed Rule 2003-1 over the objections of the UST.

Here, counsel for Mrs. Gates contends that she suffers from “severe dementia,” a serious medical condition that constitutes sufficient justification for this Court to waive her appearance at the Creditors' Meeting. This is especially so because her husband, Mr. Gates, who is a co-debtor in this case, is able and willing to testify in her stead and because the UST has not shown that Mrs. Gates's failure to appear will adversely impact the administration of her case in any meaningful way.

¹⁰ Rule 1016 addresses the continued administration of a bankruptcy case after the death or incompetency of the debtor. Fed. R. Bankr. P. 1016.

To satisfy the UST's request for additional information about her illness, however, this Court will require that counsel for Mrs. Gates provide the UST with a written report from her treating physician explaining in greater detail the extent of her disability. In that regard, this Court will enter an order protecting the privacy of the medical information that counsel for Mrs. Gates provides to the UST, at counsel's request.

Conclusion

Based on the foregoing, the Court concludes that the Amended Objection is not well-taken and should be overruled. It is clear that the UST has no good faith basis to continue asserting his position regarding his "alleged authority" as set forth in the Amended Objection. Consequently, the Motion is granted.

IT IS, THEREFORE, ORDERED that the Motion hereby is granted subject to counsel for Mrs. Gates providing a medical report from Mrs. Gates's treating physician confirming that she suffers from "severe dementia."

IT IS FURTHER ORDERED that a protective order shall be issued to protect Mrs. Gates's medical privacy, if deemed necessary by counsel for Mrs. Gates.

A separate final judgment consistent with this Memorandum Opinion will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED this the 19th day of January, 2010.

/s/ Neil P. Olack
NEIL P. OLACK
U. S. BANKRUPTCY JUDGE